CAN THE STATES REGULATE PRIVATE FORESTS?[1]

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Inasmuch as the major share of the forest lands of the United States is and always will be privately owned, the question of the extent to which the state may regulate the cutting of private forests is one of first importance. The necessity for placing some limitation upon the destruction of timber upon private land is coming to be generally admitted, but there is much difference of opinion as to the extent to which the state may limit the property rights of the owner of forest lands. The purpose of this paper is to consider the legal questions connected with legislation by the states to provide for the public control of private forests.

Last year a bill was introduced into the legislature of Louisiana, the purpose of which was to "preserve and protect timber and lumber resources of the State of Louisiana, and to prohibit the felling, cutting down, girdling, or deadening of trees of a less diameter than twelve inches, measuring four feet from the base, whether upon public or private lands, and to make the same a misdemeanor, and provide for the punishment thereof on conviction." The reasons for the enactment of this measure, as stated in the preamble of the bill, were that "the wholesale and indiscriminate destruction of timber and trees in the State of Louisiana is rapidly tending to produce a dearth of timber and lumber, to the great prejudice and injury of the people of the whole state." Accordingly the bill stipulated that:

> After the passage and promulgation of this act it shall be unlawful for any person or persons to fell or cut down or girdle or deaden any forest tree or trees other than fruit or willow trees, whether upon public or private lands, of a less diameter than twelve inches, measuring four feet from the base, provided always that this shall not apply to timber felled or cut down on privately owned lands for fencing or other domestic purposes, exclusively for the use of the owner of the land or his tenants; nor shall it apply to

[1]The author requests the editor to state that while the main body of this paper, as is stated in the text, is from a brief prepared by Col. Zacharie, the earlier and later parts of the paper are the work of the editor.

the clearing of lands with the *bona fide* intention of erecting houses or of putting the land so cleared under cultivation, nor the making and cleaning up of ditches, nor for the purpose of creating public or private roads or other works of public utility.

Other provisions of the bill were intended to regulate the manner of cutting trees and to provide penalties for the violation of the act.

The question with which we are here concerned is, does Louisiana or do the other states have the power to pass a law containing provisions similar to those in the measure proposed in Louisiana? To answer this question it is necessary to consider the police powers of the several states. The draft of the bill prepared for the Louisiana legislature was accompanied by an argument as to the economic necessity for the enactment of the measure and as to legal competency of the state under its constitution and the general police powers to enforce the provisions of the proposed law. This brief, written by Harry P. Sneed, Esq., of the Louisiana bar, and the author, contains the following discussion of the police powers of the states as regards the government regulation of the use of private forests:

The police power of Louisiana and the other states has never been positively defined, nor its limits accurately fixed, but all the authorities seem to agree that it extends to the enactment of all reasonable laws and ordinances to protect the interests of the state and its people from injury. Although the generality of law authorities lay down the principle, that the private ownership of land or real estate extends the rights of the owner thereof *de profundis usque ad coelum* (from the depths of earth to the skies), yet they are all agreed that the principle *sic utere tuo ut non laedas alienum* (so use your own as not to injure the property of others), applies to the non-injury of other owners or of the public or the general interests of the state. So ordinances and laws have been sustained prescribing fire limits, building regulations in regard to height, ventilation, plumbing, security against fires, etc., in cities, although they interfered with the complete control or domination of the owner over his private property. [Prentice on Police Powers, p. 19, 448, section 442.] So in regard to fishery laws for the protection of fish, game and song-birds, although the fish may be in unnavigable waters, adjacent to the riparian properties, and the game and song-birds nested on land privately owned. All these laws being considered reasonable laws, controlling the use of private property in the interest of the general public. [Prentice, pp. 29, 42, 58, 59, 177, 347, 456. Freund on Police Power, p. 443, section 419.] So a statute of Indiana, prohibiting the waste of natural

gas by burning flambeaux, etc., was sustained. [Freund, p. 448, section 422, and other authorities cited in note, 47 N. E. 40; 49 N. E. 809; 130 Penn St. 235.] In 47 N. E. 20, the Supreme Court of Indiana said that the waste of natural gas by flambeaux, etc., militated against the rights of others and the general public and the statute prohibiting it was within the police power and was constitutional.

So in 49 N. E. 816, under the same statute the Supreme Court of Indiana said: "The object and policy of that inhibition is to prevent, if possible, the exhaustion of the storehouse of nature, wherein is deposited an element that ministers more to the comfort, happiness and well-being of society than any other of the bounties of the earth."

In Georgia *vs.* Tennessee Copper Company, 206 U. S. 230, there was a case presented of a Tennessee copper smelting company, just over the Georgia line, which it was claimed was by its fumes and smoke, etc., injuring property, soil and vegetation in Georgia, and an injunction was sought by the State of Georgia to prevent the injury to such property in the State of Georgia. The Supreme Court of the United States said: "It is a fair and reasonable demand on the part of the sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, they should not be further destroyed or threatened by this act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law."

The brief filed in this case by the counsel for Georgia contains many citations of authorities bearing on this question, that is, that the State of Georgia is *parens patriae,* and as such has the right to control and prevent any injury to its citizens and property holders, even where the injury is inflicted by persons outside its limits. Associate Justice Holmes, the organ of the court, says on page 237: "This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domains. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It may have to pay individuals before it can utter the word, but with it remains the final power. The alleged damage to the state as a private owner is merely a make-weight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gullying of its roads."

In the well-reasoned opinion in the case of Commonwealth *vs.* Tewsbury, 11 Metc. 58, we find the following: "Some of these acts, especially those of modern date, and those which prohibit the owner of land from using his herbage either by mowing or grazing, do provide for a compensation to the owner for the damage which he may sustain under the restraints of the act,

but many of them do not so provide. It is extremely difficult to lay down any general rule, or draw a precise line between the cases where the restraint of the right of the owner is such that compensation ought to be provided, and where the regulation is such only as to prevent a particular use of the property from being a public nuisance."

In 7 Cushing, pages 85, 86, Chief Justice Shaw, acknowledged one of the ablest jurists, in a long and very able opinion, said: "We think it is a settled principle, growing out of the nature of well-ordered civil society, that every owner of property, however absolute and unqualified may be his title, holds it under the implied liability that his use may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well as that in the interior, as that bordering on tidewaters, is derived directly or indirectly from the government and held to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as will prevent their being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient." And, on pages 95 and 96, he says: "Wherever there is a general right on the part of the public, a general duty on the part of the land owner, or any other person to respect such right, we think it is competent for the legislature, by a specific enactment, to prescribe a precise practical rule for declaring, establishing and securing respect for it. It may be said in general terms, independently of any positive enactment, that it is the right of society in the midst of a populous settlement to be exempt from the promixity of dangerous and noxious trades, and that it is the duty of the owner of real estate, in the midst of many habitations, to abstain from erecting buildings thereon, or otherwise using it for carrying on a trade dangerous to lives, health or comfort of the inhabitants of such dwellings, although a trade in itself beneficial and useful to the public.

"But such general duty and obligation not being fixed by a rule precise enough for practical purposes, we think it competent for the legislature to interpose, and by a specific enactment to declare what shall be a dangerous and noxious trade, under what circumstances and within what distance of habitations it may or shall not be set up, how the use of it shall be regulated and to prohibit any other than such regulated use by specific penalties."

So Freund, section 619, page 641, speaks of regulations of cutting of forests to prevent injuries from floods, and cites Commonwealth *vs.* Tewsbury, II Metc. 55, in which the question arose as to the right to prohibit by statute a proprietor of private land from removing gravel, stone or sand from the sea front of his property as liable to produce overflow from the sea, and the statute was sustained.

So in 7 Cushing, 55, the same statute was sustained, and on page 57 the Supreme Court of Massachusetts said: "All property is acquired and held

under the tacit condition that it shall not so be used as to injure the equal rights of others or to destroy or greatly impair the public rights and interests of the community, under the maxim of the common law *sic utere tuo ut alienum non laedas.*"

Prentice on Police Power says on page 88: "Incidentally the game laws have aided the great reform of preventing not only the destruction of forests but also the pollution of streams." [Control of Private Property for Public Interest, see Prentice, pages 29, 42, 58, 89, 177, 347 and 456.]

"In this country it would probably be a strong consideration against legislation prescribing the principles of observance or principles of foresty in the management of private forests that there is no analogy or precedent for it, unless it can be shown that the supply of forest land was limited, and in danger of exhaustion, and that the regulation was not destructive to the lands of the owner." [Freund on Police Power, section 433, page 499.]

"Forests which are essential to the physical protection of the country may be regarded as subject to a natural easement for that purpose, and the person who acquires them takes them *cum onere.*" [Freund, section 423, page 450.]

The legal questions here under consideration were brought directly and specifically before the Supreme Court of the State of Maine by a resolution adopted by the senate of that state, March 27, 1907. The senate desired to know whether the legislature had the power, under the constitution of the state, to take measures for preventing or diminishing injurious droughts and freshets, for protecting the natural water supply of the springs, streams, ponds and lakes of the state, and for diminishing injurious erosions of the land and the filling up of streams and lakes, by adopting laws intended to accomplish the following results:[2]

1. To regulate or restrict the cutting or destruction of trees growing on wild or uncultivated land by the owner thereof without compensation thereof to such owner;

2. To prohibit, restrict or regulate the wanton, wasteful or unnecessary cutting or destruction of small trees growing on any wild or uncultivated land by the owner thereof, without compensation therefor to such owner, in case such small trees are of equal or greater actual value standing and remaining for their future growth than for immediate cutting, and such trees are not intended or sought to be cut for the purpose of clearing and improving such land for use or occupation in agriculture, mining, quarrying, manufacturing, or business, or for pleasure purposes, or for a building site; or

3. In such manner to regulate or restrict the cutting or destruction of trees growing on wild or uncultivated lands by the owners thereof as to preserve or enhance the value of such lands and trees thereon, and protect

[2]103 Maine reports, 507.

and promote the interests of such owners and the common welfare of the people.

On the 10th of March, 1908, the Maine Supreme Court replied to the request of the senate by an advisory opinion in which the court held that[3]

> The legislature of Maine has by the constitution of Maine full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this state, not repugnant to this constitution, nor that of the United States.
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> It is for the legislature to determine from time to time the occasion and what laws and regulations are necessary or expedient for the defense and benefit of the people; and, however inconvenienced, restricted or even damaged, particular persons and corporations may be, such general laws and regulations are to be held valid, unless there can be pointed out some provision in the state or United States constitution, which clearly prohibits them.
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> Legislation to restrict or regulate the cutting of trees on wild or uncultivated land by the owner thereof, etc., without compensation therefor to such owner, in order to prevent or diminish injurious droughts and freshets, and to protect, preserve and maintain the natural water supply of springs, streams, ponds and lakes, etc., and to prevent or diminish injurious erosion of the land and the filling up of the rivers, ponds and lakes, etc., would not operate to "take" private property within the inhibition of the constitution.
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> While such legislation might restrict the owner of wild and uncultivated lands in his use of them, might delay his taking some of the product, might defer his anticipated profits and even thereby might cause him some loss of profit, it would nevertheless leave him his lands, their product and increase, untouched and without diminution of title, estate or quantity. He would still have large measure of control and large opportunity to realize values. He might suffer delay but not deprivation. While the use might be restricted, it would not be appropriated or "taken." Such legislation would be within the legislative power and would not operate as a taking of private property for which compensation must be made.

Thus the Supreme Court of Maine holds that its state unquestionably has the power to regulate the cutting and use of timber upon lands privately owned.

The legal principles enunciated in this decision of the Supreme Court of Maine are further elucidated by a decision of the United States Supreme Court, rendered upon the 6th of April, 1908. The case before the United States Court was one brought before it

[3]103 Maine reports, 506.

upon an appeal from the decision of the Court of Errors and Appeals of the State of New Jersey. In 1905, New Jersey passed a law enacting that

> It shall be unlawful for any person or corporation to transport or carry through pipes, conduits, ditches or canals, the waters of any fresh water lake, pond, brook, creek, river or stream of this state into any other state for use therein.

After the passage of this law the owners of land upon the Passaic River, New Jersey, made a contract with the City of New York to furnish a supply of water adequate for the needs of the Borough of Richmond. The carrying out of this contract was prohibited by an injunction issued by the Chancellor of the State[4] which injunction was affirmed by the Court of Errors and Appeals,[5] from which court the case was brought before the United States Supreme Court. This court of final appeal, in an opinion delivered by Mr. Justice Holmes, again affirmed the injunction and thus held the New Jersey statute to be valid.

Although the question before the court in this New Jersey case involved the right to use the waters of the state, the principles upon which Justice Holmes based his decision are as applicable to the government regulation of privately owned forests as to the use of waters of the state. The learned justice stated in the decision that[6]

> The boundary line between private rights of property which can only be limited on compensation by the exercise of eminent domain, and the police power of the state which can limit such rights for the public interest, cannot be determined by any formula in advance, but points in that line helping to establish it had been fixed by decisions of the court that concrete cases fall on the nearer or farther side thereof.
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> The state, as *quasi*-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners immediately concerned. *Kansas* vs. *Colorado,* 185 U. S. 125; *Georgia* vs. *Tennessee Copper Co.,* 206 U. S. 230.
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> The public interest is omnipresent wherever there is a state, and grows more pressing as population grows, and is paramount to private property of riparian proprietors . . . .

[4] 78 N. J. Eq. 525.
[5] 70 N. J. Eq. 695.
[6] 209 U. S. 349.

A state has a constitutional power to insist that its natural advantages remain unimpaired by its citizens and is not dependent upon any reason for its will so to do.

The extent of the powers possessed by the states for the regulation of privately owned forests cannot as yet be said to have been definitely determined. The foregoing analysis clearly indicates that the state and federal courts are disposed to interpret the powers of the states liberally, and it seems probable that the constitution of the federal government and the constitutions of the states will be held to permit the states to take such measures for the protection of their forests and the conservation of their other natural resources as may be demanded by present economic needs and as may be required in the interest of the future welfare of society. If this conclusion be correct, the government regulation of private forests may be considered to be primarily a question of expediency and not of constitutional law.